

## **CHAPTER 40**

### **ALTERNATIVE DISPUTE RESOLUTION PROCEDURE**

#### **§40.1. Policy.**

It is the commission's policy to encourage the resolution and early settlement of all contested matters through voluntary settlement procedures. It is the affirmative responsibility of each commission employee to effectuate this policy.

Adopted May 8, 1996  
Derived from §264.1

Effective June 6, 1996

#### **§40.2. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

**ADR** - Alternative dispute resolution.

**Alternative dispute resolution procedure or ADR procedure** - A nonjudicial and informally conducted forum for the voluntary settlement of contested matters through the intervention of an impartial third party.

**Alternative dispute resolution director or ADR director** - The director of the agency office empowered by the commission to coordinate and oversee ADR procedures and mediators.

**Contested matter** - A request for a license, permit, order, or other formal authorization from the commission that is opposed.

**Mediator** - The person appointed by the ADR office director to preside over ADR proceedings regardless of which ADR method is used.

**Participant** - The executive director, the public interest counsel, the applicant, and the persons who timely filed hearing requests which gave rise to the dispute or if parties have been named, the named parties.

**Private mediator** - A person in the profession of mediation who is not a Texas state employee and who has met all the qualifications prescribed by Texas law for mediators.

Adopted May 8, 1996  
Derived from §264.2

Effective June 6, 1996

#### **§40.3. Referral of Contested Matter for Alternative Dispute Resolution Procedures.**

The commission or the ADR director may seek to resolve a contested matter through any ADR procedure. Such procedures may include, but are not limited to, those applied to resolve matters pending in the state's district courts.

Adopted May 8, 1996  
Derived from §264.4

Effective June 6, 1996

#### **§40.4. Appointment of Mediator.**

(a) For each matter referred for ADR procedures, the ADR director shall assign a mediator, unless the participants agree upon the use of a private mediator. The ADR director may assign a substitute or additional mediator to a proceeding as the ADR director deems necessary.

(b) A private mediator may be hired for commission ADR procedures provided that:

(1) the participants unanimously agree to use a private mediator;

(2) the participants unanimously agree to the selection of the person to serve as the mediator;

(3) the mediator agrees to be subject to the direction of the commission's ADR director and to all time limits imposed by the director, the judge, statute, or regulation.

(c) If a private mediator is used, the costs for the services of the mediator shall be apportioned equally among the participants, unless otherwise agreed upon by the participants, and shall be paid directly to the mediator. In no event, however, shall any such costs be apportioned to a governmental subdivision or entity that is a statutory party to the hearing.

(d) All mediators in commission mediation proceedings shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

Adopted May 8, 1996  
Derived from §264.5

Effective June 6, 1996

#### **§40.5. Qualifications of Mediators.**

(a) The commission shall establish a pool of commission staff mediators to resolve contested matters through ADR procedures.

(1) To the extent practicable, each mediator shall receive 40 hours of formal training in ADR procedures through programs approved by the ADR director.

(2) Other individuals may serve as mediators on an ad hoc basis in light of particular skills or experience which will facilitate the resolution of individual contested matters.

(b) SOAH mediators, employees of other agencies who are mediators, and private *pro bono* mediators may be assigned to contested matters as needed.

(1) Each mediator shall first have received 40 hours of Texas mediation training as prescribed by Texas law.

(2) Each mediator shall have some expertise in the area of the contested matter.

(3) If the mediator is a SOAH judge, that person will not also sit as the judge for the case if the contested matter goes to public hearing.

Adopted May 8, 1996  
Derived from §264.6

Effective June 6, 1996

#### **§40.6. Commencement of ADR.**

(a) The commission encourages the resolution of disputes at any time, whether under this chapter or not. ADR procedures under this chapter may begin, at the discretion of the ADR director, anytime after the application has been deemed administratively complete and at least one letter protesting the application has been filed with the commission.

(b) Upon unanimous motion of the parties and at the discretion of the judge, the provisions of this subsection may apply to contested hearings. In such cases, it is within the discretion of the judge to continue the hearing to allow the use of ADR procedures.

Adopted May 8, 1996  
Derived from §264.7

Effective June 6, 1996

#### **§40.7. Stipulations.**

When ADR procedures do not result in the full settlement of a contested matter, the participants, in conjunction with the mediator, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the judge assigned to conduct the hearing on the merits and shall be included in the hearing record.

Adopted May 8, 1996  
Derived from §264.8

Effective June 6, 1996

#### **§40.8. Agreements.**

Agreements of the participants reached as a result of ADR must be in writing, and are enforceable in the same manner as any other written contract.

Adopted May 8, 1996  
Derived from §264.9

Effective June 6, 1996

#### **§40.9. Confidentiality of Communications in Alternative Dispute Resolution Procedures.**

(a) Except as provided in subsections (c) and (d) of this section, a communication relating to the subject matter made by a participant in an ADR procedure, whether before or after the institution of

formal proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or record made of an ADR procedure are confidential, and participants, including the mediator, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(e) The mediator may not, directly or indirectly, communicate with the judge or any commissioner, on any aspect of ADR negotiations made confidential by this section.

Adopted May 8, 1996  
Derived from §264.10

Effective June 6, 1996

Adoption of §§40.1-40.9  
Date Adopted: May 8, 1996  
Date Filed with the Secretary of State: May 16, 1996  
Date Published in the *Texas Register*: May 28, 1996  
Date Effective: June 6, 1996

**Derivation Table**  
**Chapter 40 - Alternative Dispute Resolution Procedure**

This table is to be used to track sections after rule revisions. The column on the left should list the sections after the revision. The column on the right should list where the section was prior to the revision.

<b>New Section</b>	<b>Old Section</b>
40.1	264.1
40.2	264.2
40.3	264.4
40.4	264.5
40.5	264.6
40.6	264.7
40.7	264.8
40.8	264.9
40.9	264.10